UNI-OCEAN LINES PTE. LTD.

v.

KAMAL SOOD (M.W.)

HIGH COURT, SINGAPORE
FA CHUA J
[SUIT NO. 335 OF 1980]
2 AUGUST 1983

SHIPPING: *Voyage - Charterparty - Clause requiring notice as to date of loading - Meaning of 'expected ready to load' - Circumstances in which an option to cancel the charterparty may be exercised - Unseaworthiness - Right to enter into voyage charterparty as principal although not registered owner - Carrying cargoes against the terms of the principal charterparty - Effect on voyage charterparty.*

By the terms of a charterparty dated 10 January 1980 but executed on 16 January 1980 and made between the plaintiffs and the defendant's local representative in Singapore, the plaintiffs agreed to carry 5,000 metric tons Minmax bitumen in drums for the defendant on the plaintiffs' motor vessel the "Reunion" for a voyage from Singapore to Chalna, Bangladesh. It was an express term of the charterparty that the "Reunion" would be expected ready to load on 10 to 25 January 1980.

On 10 January the "Reunion" was in Bangkok and was expected to be in Singapore on 16 January for discharging.

On 18 January the "Reunion" arrived in Singapore and completed discharging her cargo on 22 January and was thereupon ready to move on to Jurong Port where a berth had been reserved for 1100 hours.

However despite the reservation there was no berth available. Moreover at 1540 hours the same day the "Reunion" was arrested and was released the next day at 1645 hours.

The defendant, by a telex dated 22 January at 1138 hours, alleged that the plaintiffs were in breach of the charterparty and in particular Clause 21. The plaintiffs replied at 1139 hours the same day rejecting the defendnt's allegation and stating that the defendant's local representative in Singapore had been informed by telex on 12 and 21 January and further by telephone that the "Reunion" would be in the loading port by 25 January. The defendant thereupon by a telex dated 22 January cancelled the charterparty and thereby repudiated the contract. The plaintiffs now claim damages for the loss they have suffered as a result of the wrongful repudiation of the charterparty by the defendant.

Held:

[1] The plaintiffs were not in breach of Clause 21 as:

(a) they had in all their telexes to the defendant's local agent informed him that the loading date would be 25 January as was stated in the charterparty.

(b) the 10 day's notice requirement was an impossibility as the charterparty had not been executed by the defendant then.

(c) the required 72 hours' notice had been served a day earlier on 21 January.

(d) a further notice was served when the plaintiffs rejected the defendant's allegation that they (the plaintiffs) were in breach of the charterparty.

[2] The defendant did not have the right to cancel the charterparty under Clause 11 before the cancelling date.

[3] The defendant bears the onus of proving that the plaintiffs could not be ready to load on 25 January when they repudiated the charterparty on 22 January and this they failed to do.

[4] The plaintiffs need not proceed to be ready to load on 25 January once the defendant had repudiated the charterparty and had evinced an intention not to load.

[5] The plaintiffs were not in breach of Clause 1 and Box 9 as it was clear in the minds of both the plaintiffs and the defendant at the time the charterparty was executed that the plaintiffs reasonably expected the "Reunion" to load on 25 January.

[6] The defendant bears the burden of proving unseaworthiness and he must plead it with sufficient particularity. Here the "Reunion" was in good running condition and the changing of deck plates in no way indicated that it was unseaworthy.

[7] The plaintiffs were the proper party to claim as they had assumed the responsibilities of the owner and had complete control of the "Reunion".

[8] The evidence showed that the owners had no objections and had agreed to the carriage of bitumen on board the "Reunion" Moreover the defendant not being a party to the principal charterparty, could not complain if the plaintiffs carried cargoes against the terms of the principal charterparty.

[Judgment for the plaintiffs.]

Cases referred to:
Christie & Vesey v. Helevetia [1960] 1 Lloyd's Rep 540
The Madeleine [1967] 2 Lloyd's Rep 224
The Mihalis Angelos [1971] 1 QB 164
Aktiebolaget Nordiska Lloyd v. J. Brownlie & Co. (Hull) Ltd. [1925] 30 Com Cas 307
Noemijulia Steamship Co. Ltd. v. Minister of Food [1951] 1 KB 223

Other sources referred to:
Charterparties, Scrutton, 18th Edn., pp. 1, 30, 84

For the plaintiffs - H.Haridass
For the defendant - G. Murugaiyan (Shah with him)

JUDGMENT

FA Chua J:

The plaintiffs' claim against the defendant is for loss and damage suffered by the plaintiffs as a result of the defendant cancelling the Charterparty executed in Singapore on 16 January 1980, by the defendant (the Charterparty), whereby the plaintiffs agreed to carry 5000 metric tons Minmax bitumen in drums for the defendant on the plaintiffs' motor vessel the "Reunion" for a voyage from Singapore to Chalna, Bangladesh.

The plaintiffs are the dispondent owners of the "Reunion". The defendant carries on business in Calcutta, India. The Charterparty was dated 10 January 1980, but was executed in Singapore on 16 January 1980, by the defendant's local representative, Jim Ellis.

On 10 January 1980, the "Reunion" was in Bangkok and was expected to be in Singapore on 16 January for discharging. It was an express term of the Charterparty that the "Reunion" would be expected ready to load on 10 to 25 January 1980.

The "Reunion" arrived in Singapore from Bangkok on 18 January and commenced discharging her cargo on the same day. The discharge of the general cargo was completed on 22 January and the "Reunion" was preparing to move to Jurong Port. However, there was no berth available though she had reserved a berth for 1100 hrs. for the same day. At 1540 hrs. the same day the "Reunion" was arrested. She was released a day later at 1645 hrs.

By telex dated 22 January 1980, at 1138 hrs. (AB 21) the defendant alleged that the plaintiffs were in breach of the Charterparty and in particular Clause 21. The plaintiffs immediately replied on the same day by telex at 1139 hrs. expressing surprise and stating that the defendant's local agent Jim Ellis was not only informed by telex of 12 and 21 January but also by telephone that the vessel would be in loading port by 25 January and rejecting the defendant's allegation that the plaintiffs were in breach of the Charterparty. By telex dated 22 January (AB 22), the defendant cancelled the Charterparty and thereby repudiated the contract. The plaintiffs accepted the repudiation. Legal proceedings commenced thereafter.

The defendant's contention is this. The plaintiffs had failed to give the required notice under Clause 21 of the Charterparty; that as the "Reunion" was under arrest from 22 January to 23 January it was anticipated by the defendant's representative in Singapore that the "Reunion" would not be able to load cargo by 25 January as required by the Charterparty; that the failure of the plaintiffs to give the required notice under Clause 21 evinced their intention not to be bound by the Charterparty and/or evinced their inability to perform the same; that the plaintiffs' said failure and conduct coupled with the arrest of the "Reunion" justified the defendant's cancellation of the Charterparty on 22 January at 1648 hrs. and that the defendant thereafter obtained an alternative vessel to load the defendant's cargo, in discharge of her duty to mitigate her damage. The defendant further contends that her aforesaid justification in cancelling the Charterparty is supported by the events that happened after the cancellation of the Charterparty and which events clearly show that even if the defendant had not cancelled the Charterparty the plaintiffs would not have been able to load the defendant's cargo by 25 January at Port Merlimau.

The defendant submits that for these reasons she was entitled to cancel the Charterparty in anticipation of the plaintiffs' breach of Clause 1 of the Charterparty.

> Clause 21 requires that
>
> Owners or Master to telex 10 days before arrival to Charterers attention at telex RS 23125 Singapore also telex same 72, 48, 24 hours prior loading to shipper and charterer at Singapore.

The Charterparty though dated 10 January 1980, was in fact signed by the defendant's representative on 16 January. Since the loading date of the Charterparty was to be on 25 January then the ten days notice ought to be 15 January which in effect was not possible as the Charterparty was not executed by the defendant then. The plaintiffs, however, were in daily contact with the defendant's local agent in Singapore and they had in fact in all their telexes to the defendant's local agent informed the defendant's local agent that the loading date for the defendant's goods would be 25 January as was stated in the Charterparty.

As regards the 72 hours notice to be given to the defendant, the plaintiffs had served the necessary notice to the defendant a day earlier (See AB19). A further notice was served by the plaintiffs on 22 January in their reply to the defendant's telex of the same date one minute after the defendant had alleged that the plaintiffs were in breach of the Charterparty particularly Clause 21 (See AB21).

Having regard to these matters it is clear that the plaintiffs were not in breach of Clause 21.

Clause 11 provides:

> Should the vessel not be ready to load (whether in berth or not) on or before the date indicated in Box 19 charters have the option of cancelling this contract ...

A charterer is not entitled to cancel under the cancelling date even though it is clear that the owner will be unable to tender the vessel in time: *Christie & Vesey v. Helevetia*, [1960] 1 Lloyd's Rep 540; *The Madeleine*, [1967] 2 Lloyd's Rep 224; *The Mihalis Angelos*, [1971] 1 QB 164.

Roskill J in *The Madeleine*, said with reference to the first sentence of Clause 22 (the cancelling clause), (P. 241):

> ... If there were what I will call an anticipatory right to cancel under the clause, it could only arise by necessary implication into Clause 22. For my part, I have great difficulty in seeing how, where there is an express right given to cancel if the vessel is not delivered by 10 May (the cancelling date), an implied right can concurrently exist to cancel at some earlier point of time, namely, when it becomes inevitable that the stated cancelling date will not be able to be attained by the ship ... I would say that however reasonable it might be to imply (such) a term ... it cannot be said to be necessary so to do for the purpose of giving business efficacy to the contract because the contract gives an express right to cancel at a certain date and not at any earlier time.

This statement was approved by a majority of the Court of Appeal in *The Mihalis Angelos*, in holding that in the case of a voyage charter the right to cancel did not arise before the cancelling date.

In *Aktiebolaget Nordiska Lloyd v. J Brownlie & Co. (Hull), Ltd.* [1925] 30 Com Cas 307, the English Court of Appeal held that notice of readiness to load was immaterial for the purposes of the cancelling clause.

It follows that even if no notice under Clause 21 was given, the defendant did not have the right to cancel under Clause 11.

The fact that the charterer may not exercise his option to cancel under this clause before the cancelling date does not affect any rights the charterer may have at common law, or the time at which such rights may be exercised. Roskill J in *The Madeleine* said (p. 244):

> Of course, the fact that there is no contractual right to cancel in advance does not prevent a charterer seeking to claim the right to rescind in advance of the cancelling date, as the learned editors of Scrutton put it 'at common law'... Where the charterer seeks to say that the contract has been frustrated or that there has been an anticipatory breach which entitled him to rescind, then he has such rights as are given to him at common law.

The "Reunion" arrived from Bangkok on 18 January 1980, and commenced discharging her cargo on the same day. The discharge of the general cargo was completed on 22 January at 0600 hrs. and from 0600 hrs. to 1540 hrs. on the same day the "Reunion" was preparing to move to Jurong Port. However, there was no berth available though a berth had been reserved for her for 1100 hrs. for the same day. At 1540 hrs. on the same day, the "Reunion" was arrested. It was a wrongful arrest. She was released the next day at 1645 hrs. without any security being tendered. She was berthed at Jurong Port on 24 January.

The defendant says that because the "Reunion" only berthed on 24 January the plaintiffs would not have been able to perform the Charterparty and be ready to load on 25 January.

Once the defendant had repudiated the Charterparty and had evinced an intention that she no longer would ship on the plaintiffs' vessel the plaintiffs need not proceed to be ready on 25 January. The onus is on the defendant to show that the plaintiffs could not be ready on 25 January when the defendant repudiated the Charterparty on 22 January. The defendant must also prove that at the date of the cancellation the vessel was in such a condition that the plaintiffs must necessarily - not might - be unable to comply with their obligation to load the defendant's cargo (*Noemijulia Steamship Co.Ltd v. Minister of Food.* [1951] 1 KB 223). This the defendant has failed to do.

The evidence adduced by the plaintiffs shows that if the defendant had not cancelled the Charterparty, the plaintiffs would have been able to berth the "Reunion" at Jurong Port on the afternoon of 23 January and discharge the balance of cargo of 3,800 tons of barite ore and tender the vessel to the defendant at the latest on 25 January. If the plaintiffs had no real intention of keeping to the terms of the Charterparty or felt that they had no hope of keeping 25 January appointment, they would not have gone to the extent of seeking on 22 January and obtaining the approval of the Sheriff on 23 January to move the "Reunion" to Jurong Port for unloading purposes.

The defendant says that the plaintiffs had doubts as to their ability to offer the vessel to receive the defendant's cargo on 25 January. The vessel arrived in Singapore from Bangkok two days late and the plaintiffs were trying to have the cancelling date extended to 31 January.

Clause 1 with Box 9 is the expected ready to load clause. It is clear that the plaintiffs had on 10 January 1980, every reason to expect that the "Reunion" would load by 25 January and when the Charterparty was executed on 16 January it was clear in the minds of both the plaintiffs and the defendant that the plaintiffs reasonably expected the vessel to load on 25 January.

In *The Mihalis Angelos*, Edmund Davies LJ stated (p. 197):

> These words ('expected ready to load under this charter') mean that, in the light of the facts known to the owner at the time of making the contract, he honestly expected that the vessel would be ready as stated and, further, that such expectation was based on reasonable grounds: *Samuel Sanday & Co. v. Keighley Maxted & Co.* [1922] 27 Com. Cas. 296.

And Megaw LJ said (p. 204):

> It is not disputed that when a charter includes the words 'expected ready to load ...' a contractual obligation on the part of the shipowner is involved. It is not an obligation that the vessel will be ready to load on the stated date, nor about the stated date, if the date is qualified, as here, by 'about'. The owner is not in breach merely because the vessel arrives much later, or indeed does not arrive at all. The owner is not undertaking that there will be no unexpected delay. But he is undertaking that he honestly and on reasonable grounds believes, at the time of the contract, that the date named is the date when the vessel will be ready to load. Therefore in order to establish a breach of that obligation the charterer has the burden of showing that the owner's contractually expressed expectation was not his honest expectation, or, at the least, that the owner did not have reasonable grounds for it.

In my view there is therefore no breach of Clause 1 and Box 9 by the plaintiffs.

The defendant says that because repairs were done to the "Reunion" from 28 January 1980, till 14 February 1980, and because there was changing of deck plates and as 2460 sq. ft. of deck plates were received on the vessel on 22 January 1980, or 25 January 1980, the vessel can be considered unseaworthy.

The defendant in her amended defence says in para. 5 that she has no knowledge and requires strict proof from the plaintiffs that the "Reunion" was seaworthy.

Now, the burden of proving unseaworthiness rests upon the party asserting it and the party intending to rely upon unseaworthiness must plead it with sufficient particularity, (*Scrutton on Charterparties* 18th Edn., p. 84).

The changing of deck plates on the vessel merely involves the removal of old plates by gas cutting and the replacement therefor by new plates and welding. It is not a repair job let alone major repair work as the defendant seems to suggest. The "Reunion" was in good running condition in January 1980. She needed no repairs, she was in a condition to discharge the cargo she was carrying and carry fresh cargo and proceed to Chalna.

After the defendant cancelled the Charterparty the plaintiffs were looking for suitable cargo to carry. They could not get any and whilst waiting to perform the subsequent fixture, they carried out the deck plate changes. The vessel, however, remained on hire. All the vessel's trading papers were valid indicating the seaworthiness of the vessel and there was nothing outstanding which prevented the trading of the vessel.

The defendant pleads in para. 12 of the Amended Defence that the defendant first became aware on or around 19 February 1982, that the plaintiffs were and are not the owners of the "Reunion" of which fact the defendant had no notice whatsoever. Therefore, the defendant denies that benefit of the Charterparty could enure to the plaintiffs and require strict proof thereof. Consequently the plaintiffs have no cause of action.

The plaintiffs are long term charterers who had contracted as "owners" and not "as agents". The plaintiffs as against the shipowners have the right to enter into the voyage Charterparty (See *Scrutton* p. 1). They had complete control of the vessel and were in fact performing other fixtures with the vessel.

The following passage appears in *Scrutton* at p. 30 Article 15:

> Where a person signs the Charter in his own name without qualification, he is *prima facie* deemed to contract personally, and, in order to prevent this liability from attaching, it must be clear from the other portions of the charterparty that he did not intend to bind himself as principal.

Here the plaintiffs described themselves as owners and they signed as owners. There is a special relationship between the registered owners and the plaintiffs. The Managing Director of the plaintiffs PW2, is also the Managing Director of the United Orient Lines, the registered owners. The evidence is that the plaintiffs assumed the responsibility of the owners and that PW2 holds two-third shares in the plaintiff company and United Orient Lines.

Clearly the plaintiffs are the proper party to claim.

Finally, the defendant says that under the Uniform Time-Charter between the plaintiffs as charterers and United Orient Lines Ltd. as owners of the "Reunion" (Ex. P21), the plaintiffs were allowed by Clause 2 to employ the "Reunion" in lawful trades for the carriage of lawful merchandise only but were absolutely prohibited from shipping any injurious, inflammable or dangerous goods. Notwithstanding the prohibition the plaintiffs deliberately failed to inform the defendant or her agent or attorney that the vessel could not carry the defendant's cargo, bitumen being dangerous goods. The defendant submits that this prohibited the plaintiffs from entering into the Charterparty with the defendant.

As I have stated the evidence is that there was very close relationship between the plaintiffs and the owners and the owners had no objection and had agreed to the carriage of bitumen. The vessel's insurance did not prohibit the carrying of the bitumen cargo. In any case, the defendant is not a party to the Charterparty P21 and cannot complain if the plaintiffs carry cargoes against the principal Charterparty. This submission of the defendant is untenable.

For these reasons the plaintiffs must succeed in their claim for damages.

The defendant submits that the plaintiffs have not suffered from the repudiation and are entitled only to nominal damages. There is no substance in this submission.

There will be judgment for the plaintiffs in the sum of $188,670.60 with interest from 25 January 1980 till payment at the rate of 12% per annum and costs.

Also found at [1983] 2 CLJ 151